

Public Notice

**US Army Corps
of Engineers
US Army Corps
of Engineers
Huntington District**

Public Notice No.

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Date:

19 May 2003

Closing Date:

NA

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Huntington District

ATTN: Mr. Mark Taylor, CELRH-OR-FS (WV, KY) or

Phone (304)-529-5710

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Phone (304)-529-5210

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Huntington, WV 25701-2070

"Section 404 of the Clean Water Act Permit Program and the Regulation of Surface Coal Mining Activities"

The US Army Corps of Engineers and the US Environmental Protection Agency continue their educational efforts to inform persons engaged in surface coal mining activities about the permit requirement of the Clean Water Act Section 404 Permit Program. Enclosed are three documents which explain these requirements and specify the notification requirements associated with obtaining Section 404 authorization under Nationwide Permit Number 21 for surface coal mining activities. Please contact the US Army Corps of Engineers if you need further information.

PRE-CONSTRUCTION NOTIFICATION REQUIREMENTS FOR NATIONWIDE PERMIT 21, SURFACE COAL MINING ACTIVITIES

The purpose of this public notice is to detail the information requirements for a Nationwide Permit (NWP) 21 evaluation. Section 404 of the Clean Water Act requires that a Department of the Army permit be obtained prior to the discharge of dredged or fill material into waters of the United States. These requirements must be met for any mining operation which will result in a discharge of dredged or fill material into waters of the United States, which include perennial, intermittent, and ephemeral stream channels as well as jurisdictional wetlands. These requirements are valid for new projects, current ongoing projects seeking re-authorization, and projects which have never received authorization (See public notice 200200248-21, dated December 6, 2002, available on the Internet at http://www.lrh.usace.army.mil/or/permits/pub_notices.html). The provisions of Section 404 of the Clean Water Act are explained in detail within the attached fact sheet.

Nationwide Permit 21 authorizes the discharge of dredged or fill material into waters of the United States associated with surface coal mining and reclamation activities provided the activities are authorized by DOI, OSM, or states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 provided the permittee notifies the District Engineer in accordance with the "notification" general condition. In addition, to be authorized by this nationwide permit, the District Engineer must determine the adverse environmental effects associated with the activities are minimal both individually and cumulatively and must notify the project sponsor in writing.

It is imperative that all mining operations that are currently discharging, or propose to discharge dredged or fill material into waters of the United States contact this office immediately to apply for a Section 404 permit.

In addition to the basic requirements of General Condition 13 (Notification) (b) of the NWPs, which are available on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002nwps.pdf>, the following information is required in the Pre-Construction Notification (PCN):

1. A detailed description of proposed mining activity.
 - a. Provide the approximate linear feet and flow regimes (e.g., ephemeral, intermittent, or perennial) of stream(s) that would be impacted by the proposed activity.
 - b. Provide the approximate acres of wetland(s) that would be impacted by the proposed activity.
 - c. For discharges into special aquatic sites, including wetlands and riffle and pool complexes, the PCN must also include a delineation of affected sites.
 - d. Provide the drainage acreage for the proposed activity (If a valley fill is involved, the drainage acreage must be calculated from the toe of the fill).
 - e. Describe the proposed activity's purpose.

- f. Provide the date you propose to begin work on the mining activity and the date work is expected to be completed.
- g. Describe the type (rock, sand, dirt, rubble, etc.) and quantity (cubic yards) of dredged or fill material proposed to be discharged into the aquatic environment.

2. Information to allow the District Engineer to determine if a project will result in minimal adverse environmental effects on the aquatic environment, both individually and cumulatively:

- h. A discussion of how the project has been designed and constructed to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the site. This discussion may include, but not limited to, the following:
 - i. Demonstration that there is not a practicable alternative outside of waters of the U.S., including other alternatives that were considered.
 - ii. Demonstration that sediment control structures will be located as close as practical to the fill(s) and/or mining area with which it is associated.
- i. An assessment of the waters of the U.S. proposed to be impacted by the project. The assessment must include the following information.
 - i. A general description of the aquatic environment directly affected, as well as the aquatic resources a reasonable distance downstream. For stream impacts, the areas to be impacted shall be assessed to include the stream pattern, profile and dimensions. The appropriate stream assessment (e.g., The U.S. Environmental Protection Agency's Rapid Bioassessment Protocol for Use in Wadeable Streams and Rivers [RBP], and the Eastern Kentucky Stream Assessment Protocol in Kentucky, Qualitative Habitat Evaluation Index [QHEI] in Ohio) shall indicate the ephemeral, intermittent and perennial reaches to be impacted. A functional assessment is required for wetland impacts (i.e. Ohio Rapid Assessment Method [ORAM] and/or Hydrogeomorphic Approach to Assessing Wetlands [HGM]). The assessment should indicate the wetland type(s) to be impacted. Other approved functional assessment methodologies are also acceptable. The assessment must include a brief discussion of the rationale supporting the conclusion.
 - ii. Date(s) delineation and/or assessment was/were conducted.
 - iii. Name and contact information of individual(s) conducting the assessment.
 - iv. A site map indicating location(s) of delineation(s) and/or assessment(s) and associated photographs in relation to the proposed activity.
- j. A summary of the proposed impacts to the aquatic resources. This summary must include an evaluation of the impact on the environment that results from the incremental impact of the proposed activity when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes them. An example would be to consider other land disturbance activities such as mining, logging, agriculture, or road construction, within the same watershed as the proposed activity on water quality and aquatic habitat.

2. The PCN should include an original and five copies of the above information to expedite agency coordination.


In accordance with the conditions of NWP 21 a compensatory mitigation plan must be submitted in order to offset the unavoidable permanent and temporary losses of aquatic functions and values and ensure those losses result in minimal adverse effects on the aquatic environment. The compensatory mitigation plan must be developed in accordance with General Condition 19 of the NWPs and the Corps Regulatory Guidance Letter dated December 24, 2002, available on the Internet at

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rgl01-01.htm>. The following is a brief description of the required information to be submitted in a compensatory mitigation plan:

1. Baseline Information;
2. Goals and Objectives;
3. Site Selection;
4. Mitigation Work Plan;
5. Performance Standards;
6. Project Success;
6. Site Protection;
7. Contingency Plan;
8. Monitoring and Long-term Management;
9. Financial Assurances.

Typically, compensatory mitigation consists of on-site and/or off-site stream/wetland restoration, enhancement or creation projects in order to offset the unavoidable impacts to the functions and values of the aquatic resource(s) to be impacted by a proposed operation. However, in some instances, it may be acceptable to allow the use of mitigation banks and/or in-lieu fee arrangements. Use of mitigation banks requires a signed purchase agreement for the number of required credits to offset the unavoidable impacts to the aquatic resource. Under an in-lieu fee arrangement the applicant would contribute a fee into a fund to be used by an independent recipient to accomplish the appropriate compensatory mitigation. In-lieu fee arrangements are only acceptable if federally approved. A performance mitigation bond or other appropriate financial instruments may also be posted for impacts to waters of the U.S. as a result of the proposed surface coal mining activity. The performance bond would be released after mitigation success criteria have been met.

We hope this guidance will assist you in preparing your NWP 21 PCN request. If you have any questions concerning the above, for projects in Ohio please contact Ms. Kimberly Courts-Brown at 304-529-5210 and for projects in Kentucky or West Virginia please contact Mr. Mark A. Taylor at 304-529-5710.



Ginger Mullins, Chief
Regulatory Branch



United States Environmental Protection Agency
Office of Water
Washington, D.C. 20460

United States Army Corps of Engineers
Washington, D.C. 20314



**US ARMY CORPS
OF ENGINEERS**

MEMORANDUM FOR THE FIELD

To: U.S. Army Corps of Engineers District Commanders
Huntington, Louisville, and Pittsburgh

U.S. Environmental Protection Agency Regional Administrators
Regions III, IV, and V

Subject: Meeting the Requirements of the CWA Section 404 Permit Program

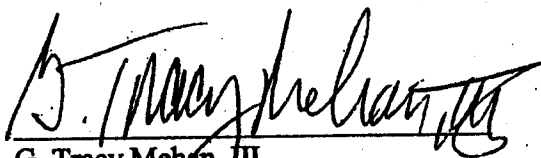
Among our highest priorities in the joint implementation of the Clean Water Act Section 404 regulatory program is to ensure effective protection for human health and the environment through fair and consistent application of the permitting requirements established under this program. An important aspect of obtaining compliance with these requirements is providing the public with the information necessary to understand what the law requires of them and to provide contact information where questions regarding the applicability of the regulatory program to proposed activities in waters of the United States can be answered.

In this regard, we are becoming increasingly aware of circumstances in Kentucky, West Virginia, and Ohio involving coal mining operations that may be discharging dredged or fill material in waters of the United States without current CWA authorization or a permit application to the Corps of Engineers. If this information is correct, we need to work quickly to address this situation and ensure compliance with the requirements of CWA Section 404 while avoiding disruptions to legitimate mining activities. As a first step, it is critical to address any questions that may exist regarding the application of CWA Section 404 to the various mining related activities that occur in waters of the U.S., including construction of valley fills and coal waste impoundments, road crossings, in-stream mining, placement of sediment ponds, and similar mining discharges. The Corps has previously worked to clarify, for example, the need for coal operators to apply for reauthorization under the recently issued Nationwide permit #21 for their ongoing mining related discharges previously approved under permits that expired in February, 2003.

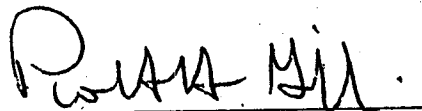
We believe it is necessary to provide information as soon as possible to the coal mining industry that reiterates CWA Section 404 permitting requirements and prompts those that may be discharging in waters to apply immediately to the Corps for a CWA Section 404 permit. To help you in your efforts to assist coal operators in ensuring that their activities comply fully with the requirements of CWA Section 404, we are attaching a fact sheet that answers some frequently asked questions regarding the regulatory program and encourages anyone with questions to

contact the Corps or EPA for additional clarification. Using the Corps Public Notice procedures and other methods available to you that ensures broad distribution within the coal mining industry, we request that you coordinate quickly to provide this fact sheet to mining companies within your Districts and Regions reiterating their obligation to comply with the requirements of the CWA.

We appreciate your immediate and personal attention to this very important matter. If you or your staff have any questions regarding this memorandum, please contact Mr. Mark Sudol, Chief of the Regulatory Branch, Corps Headquarters at (202) 761- 4750 or Mr. Gregory Peck, Deputy Director of EPA's Wetlands Division at (202) 566-1359.



G. Tracy Mehan, III
Assistant Administrator for Water
U.S. Environmental Protection Agency



Robert H. Griffin
Major General, USA
Director of Civil Works

Attachment



**US Army Corps
of Engineers**

Clean Water Act § 404 Permit Program & Surface Coal Mining Activities

Overview of Clean Water Act

Section 301(a) of the Clean Water Act (CWA or "Act") generally prohibits a "discharge of a pollutant" unless you have obtained, and comply with, a permit issued under the Act. You generally are subject to the requirement to obtain a CWA permit whenever your activity results in the addition of a pollutant from a point source to waters of the United States. Some examples of the materials included in the Act's definition of pollutants are: dredged spoil, solid waste, chemical wastes, rock, sand, cellar dirt, and industrial waste. Point sources subject to the Act's permitting requirements include not only pipelines, outfalls, and ditches, but also equipment such as bulldozers, backhoes, clamshells, and draglines. The CWA applies to a wide range of waterbodies such as lakes and streams as well as wetlands.

The Act creates two types of permits, one issued under § 404 of the Act, which applies to discharges of dredged or fill material, and the other under § 402, which applies to all other types of pollutants (for example, wastewater and industrial effluents). This fact sheet focuses on § 404 permitting, and provides a series of questions and answers to help explain that program's applicability.

Questions and Answers on § 404 Permit Program

Why would I need a § 404 permit?

If you are engaged in an activity involving the discharge of dredged or fill material to waters of the United States, then you need to get a permit under CWA § 404, which authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for such material.

Under the regulations "dredged material" subject to § 404 permitting is defined as material dredged or excavated from waters of the United States. 33 C.F.R. 323.2(c). In addition to dredged material, § 404 also applies to "fill material," which the

regulations define as material that changes the bottom elevation of waters of the United States or converts waters of the United States to dry land. 33 C.F.R. 323.2(e)(1). The regulations provide some examples of fill material, specifically including overburden from mining or other excavation activities as well as materials used to create any structure or infrastructure in waters of the United States such as an embankment for a sediment pond or slurry impoundment. 33 C.F.R. 323.2(e)(2).

What are some examples of mining related activities that may require a CWA permit?

Mining related activities conducted in streams or wetlands typically will result in the addition of dredged or fill material and thus need a CWA permit. For example, placement of excess spoil in valley fills, construction of slurry impoundments, mine face-ups, dams for sediment ponds, road crossings, in-stream mining that includes discharges, and similar activities that involve the placement of materials in a stream or wetland require a CWA § 404 permit. If you have any question whether or not your activity involves a discharge that requires a § 404 permit, you should contact the Corps of Engineers.

Many of the streams affected by mining activities do not have water in them all the time; some only when it rains. Is a CWA permit required when my mining activities are in these small streams?

It is best to contact the Corps of Engineers before you conduct any mining activity in a stream, even if the stream only flows after rain events or snowmelt. The Corps will be able to advise you whether or not the stream in which you are proposing to conduct your mining related activity (e.g., build a valley fill) is subject to the CWA.

What kinds of § 404 permits are there?

There are two basic types of permits available under § 404: individual permits and general permits. Individual permits are generally required for potentially significant impacts and involve a project-specific review of potential impacts and alternatives. General permits are available for categories of activities that are similar in nature and will cause only minimal adverse individual or cumulative effects. General permits may be issued on a nationwide, regional, or statewide basis and provide an expedited means for permitting the covered categories of activities. The Corps of Engineers recently re-issued and revised its nationwide general permits on January 15, 2002, including NationWide Permit (NWP) 21, which applies to the category of surface coal mining activities authorized by the Surface Mining Control and Reclamation Act.

I already have a mining permit under the Surface Mining Control and Reclamation Act. Do I still need a § 404 permit for any associated discharges of dredged or fill material?

Yes. Permits issued under the Surface Mining Control and Reclamation Act (SMCRA) do not substitute for a CWA § 404 permit. However, as discussed above, CWA § 404 authorization may be available for a SMCRA permitted mining activity through the use of a general permit, Nationwide Permit 21, instead of a more information intensive individual § 404 permit.

I applied for and received § 404 authorization in the past under NationWide Permit 21. do I need to do anything more?

NationWide (NWP) 21 was revised and re-issued on January 15, 2002 (67 Fed. Reg. 2020). The CWA limits the duration of NWPs to a period of no more than five years, 33 U.S.C. § 1344 (e)(2). As a result, old NWP 21 expired on February 11, 2002. If the work covered by old NWP 21 was under construction, or under contract for construction, by February 11, 2002, however, the Corps provided a limited grandfathering period under which you had until February 11, 2003 to complete the activity authorized by old NWP 21. 67 Fed. Reg. 2020. If the previously authorized activity continued (or is continuing) after that date, then re-authorization under new NWP 21 is required, and you will need to contact the Corps to seek authorization under new NWP 21. The reauthorization may require additional information and may include additional mitigation requirements to meet the revised conditions contained in the new NWP 21 general permit. The information needed and steps to do this are explained in the January 15, 2002, NWP permit reissuance package, which is available on the Corps Web Site at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nationwide_permits.htm.

I'm still confused about whether I need a § 404 permit or how I should apply for one: what should I do?

You should contact the regulatory program in the Corps District for the area in which you are located. A complete list of such contacts is available on the Corps' Webpage at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm>.